

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 16, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2014AP349-CR**

**Cir. Ct. No. 2013CT1076**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**PENNY S. ROSENDAHL,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.<sup>1</sup> Penny Rosendahl appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI). Rosendahl

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). All statutory references are to the 2011-12 version.

moved to suppress, arguing that the evidence was insufficient to justify the stop. The circuit court denied the motion to suppress, concluding that the deputy had reasonable suspicion to stop Rosendahl's vehicle. We agree and affirm Rosendahl's subsequent conviction.

## **FACTS**

¶2 Winnebago County Sheriff's Deputy Robert Zill testified at the hearing on the motion to suppress and related the following facts. On October 26, 2013, at approximately 11:36 p.m., Zill was traveling north on State Highway 76 in Winnebago County, Town of Clayton. Zill was making a right turn at an intersection when a vehicle exiting a bar parking lot failed to yield, pulling out in front of him so close that he "had to apply [his] brakes heavily so [he] could avoid a collision." Zill followed the vehicle. He observed it deviate within its own lane, make contact with the center line, "and on a couple of occasions it made contact and slightly crossed the center line in the oncoming lane of traffic." Zill also observed the vehicle "cross the center line and remain in the lane of oncoming traffic ... for a couple seconds." Zill's squad's video recorder captured Rosendahl's driving, and the circuit court watched the video twice.

¶3 The circuit court denied Rosendahl's motion to suppress, finding that the failure to yield alone was enough for reasonable suspicion. Rosendahl pleaded guilty to and was convicted of OWI, second offense. She now appeals.

## DISCUSSION

¶4 A police officer may temporarily detain an individual to investigate possible criminal behavior when the officer has reasonable suspicion that the individual has committed or is about to commit a crime. WIS. STAT. § 968.24; *State v. Post*, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. The detention is a seizure within the meaning of the Fourth Amendment of the United States Constitution and art. I, § 11 of the Wisconsin Constitution and triggers their protections. *See State v. Harris*, 206 Wis. 2d 243, 253, 256, 557 N.W.2d 245 (1996). Whether there was reasonable suspicion to conduct a stop is a question of constitutional fact, which is a mixed question of law and fact to which we apply a two-step standard of review. *Post*, 301 Wis. 2d 1, ¶8. First, we review the circuit court’s findings of historical fact under the clearly erroneous standard. *Id.* Second, we review de novo the application of those historical facts to the constitutional principles. *Id.*

¶5 For an investigatory stop to be constitutionally valid, the officer’s suspicion must be based on “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion” on the citizen’s liberty. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). What constitutes reasonable suspicion in a given situation depends on the totality of the circumstances. *Post*, 301 Wis. 2d 1, ¶¶37-38. There need not be a violation of the law to support an investigative stop. *State v. Anagnos*, 2012 WI 64, ¶47, 341 Wis. 2d 576, 815 N.W.2d 675. “The law allows a police officer to make an investigatory stop based on observations of lawful conduct so long as the reasonable inferences drawn from the lawful conduct are that criminal activity is afoot.” *State v. Waldner*, 206 Wis. 2d 51, 57, 556 N.W.2d 681 (1996). One reasonable inference to be drawn from unusual and impulsive driving is that the

driver is impaired. See *Anagnos*, 341 Wis. 2d 576, ¶¶56, 58. Weaving can contribute to reasonable suspicion that a driver is impaired so as to justify an investigatory stop. See *State v. Popke*, 2009 WI 37, ¶26, 317 Wis. 2d 118, 765 N.W.2d 569 (swerving over the center line can be a factor giving rise to reasonable suspicion to conduct a traffic stop); *Post*, 301 Wis. 2d 1, ¶¶36-38 (weaving, even within a lane, can be part of the totality of circumstances justifying a stop). Finally, the time of day may be a factor considered in assessing the totality of the circumstances for reasonable suspicion of OWI. See, e.g., *Anagnos*, 341 Wis. 2d 576, ¶58; *Post*, 301 Wis. 2d 1, ¶4; *Waldner*, 206 Wis. 2d at 58, 60.

¶6 Applying the law to Rosendahl’s case, as a threshold matter, the deputy needed only reasonable suspicion that a crime had been or was being committed to stop Rosendahl. See *Waldner*, 206 Wis. 2d at 57. Rosendahl argues that the officer did not have probable cause to stop her. But probable cause to arrest, which is a higher standard than reasonable suspicion to conduct an investigatory stop, see *County of Jefferson v. Renz*, 231 Wis. 2d 293, 317, 603 N.W.2d 541 (1999), is not the standard that applies in this review of the constitutionality of the traffic stop. We need not reach whether the deputy had probable cause to arrest Rosendahl for the traffic violation of failure to yield, because, as discussed below, the deputy had reasonable suspicion to believe she was operating a motor vehicle while intoxicated. See *Popke*, 317 Wis. 2d 118, ¶28 (distinguishing between probable cause to believe a traffic violation had occurred and reasonable suspicion that defendant was operating a motor vehicle while intoxicated); *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate court should decide case on narrowest grounds).

¶7 Rosendahl argues that the video evidence “reveals no weaving or drifting and only the very slightest of deviation from a straight path of driving”

and that considering both the deputy's testimony and the video tape evidence there is not "reasonable cause to believe that Ms. Rosendahl was operating her vehicle while intoxicated." After watching the video the second time, the circuit court stated, "I wrote down three different times where I thought maybe the car was on the line. It didn't appear to go over the line." Later, when denying the motion to suppress, the circuit court said,

I don't think in the circumstances in the video that there is any significant bad driving. As I did indicate, though, it looked like the vehicle at least touched the center line in ... three places..., and I think the officer had the right, even though he decided not to, just from the pulling out of the parking lot alone to pull her over so under those circumstances I'm going to deny the motion.

¶8 When the evidence includes disputed testimony from the arresting officer and a video showing events leading up to the arrest, the circuit court's findings of fact are subject to review under the clearly erroneous standard. *State v. Walli*, 2011 WI App 86, ¶14, 334 Wis. 2d 402, 799 N.W.2d 898. Here, the deputy's testimony was that Rosendahl's vehicle weaved within its lane and crossed the center line. The circuit court found that the video showed that Rosendahl's vehicle touched the center line on three occasions. We have reviewed the record and conclude that the circuit court's finding was not clearly erroneous.

¶9 Rosendahl failed to yield when she exited the bar parking lot at 11:36 p.m. Upon following her, Zill saw Rosendahl deviate in her lane and touch and cross the center line "on a couple of occasions." The video captured on Zill's squad's camera showed that Rosendahl's vehicle touched the center line three times. In assessing whether there was reasonable suspicion, we look at the cumulative effect of all the information Zill had at the time of the stop. *See State*

*v. Williams*, 2001 WI 21, ¶¶22, 47, 241 Wis. 2d 631, 623 N.W. 2d 106. Finally, on the ultimate question of whether the facts as found add up to a violation of constitutional principles, we can affirm the circuit court's decision on different grounds than those relied upon by the circuit court. *State v. Thames*, 2005 WI App 101, ¶10, 281 Wis. 2d 772, 700 N.W.2d 285. While the circuit court relied solely on the failure to yield when exiting the parking lot, we conclude that the totality of the circumstances demonstrates reasonable suspicion to stop Rosendahl.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

